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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

## No. 355

CHARLES H. TOMPKINS COMPANY, AND J. A. JONES CONSTRUCTION COMPANY, JOINT VENTURERS,
*Petitioners,*

v.

LLOYD E. MITCHELL, INC.; HARRY ALEXANDER, INC., AND E. C. ERNST, INC., AS JOINT VENTURERS,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF FOR RESPONDENT, LLOYD E. MITCHELL, INC., IN OPPOSITION

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The Daily Record Co., Baltimore 3, Md.

# INDEX

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| QUESTIONS PRESENTED | 2 |
| STATEMENT OF THE CASE | 3 |
| ARGUMENT: | |
| I. There is No Conflict of Decision With Another Court of Appeals | 5 |
| II. There is No Conflict With a Decision of This Court on a Federal Question | 8 |
| III. There is No Important Question of Law | 9 |
| CONCLUSION | 10 |


## TABLE OF CITATIONS

### *Cases*


| | |
|---|---|
| Bierman v. Marcus, 246 F. 2d 200 (3rd Cir., 1957) | 6 |
| Del Vecchio v. Bowers, 296 U.S. 280, 80 L. Ed. 229, 56 S. Ct. 190 (1935) | 8 |
| Milmar Estate, Inc. v. Marcus, 356 U.S. 933, 2 L. Ed. 2d 762, 78 S. Ct. 744 (1958) | 6 |
| Standard Surety & Casualty Co. v. Baker, 105 F. 2d 578 (8th Cir., 1939) | 6 |
| Texas v. Florida, 306 U.S. 398, 83 L. Ed. 817, 59 S. Ct. 563 (1939) | 9 |
| U. S. v. Munn, 105 F. 2d 578 (5th Cir., 1939) | 5 |


### *Rules*


| | |
|---|---|
| U. S. Sup. Ct. Rule 19(1)(b) | 8 |

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### OPINIONS BELOW

The opinions below are adequately set forth in the Petition.

### JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## QUESTIONS PRESENTED

Respondent Mitchell is dissatisfied with the presentation of the Questions Presented by Petitioner. In its opinion the questions presented are:

1. On a building construction project, where a Board of Arbitration has determined that it is not the obligation of the mechanical subcontractor to perform certain work under its subcontract and another Board of Arbitration has determined that it is not the obligation of the electrical subcontractor to perform said work under its subcontract, following the first of which the prime contractor agrees with the mechanical subcontractor, in writing, that it will comply with the award in favor of said subcontractor, orders only the mechanical subcontractor to perform the work as an extra, accepts such extra work and pays for it, may the prime contractor properly use an interpleader proceeding in order to vacate the two awards and re-litigate the alleged liability for the work of one of the two subcontractors through the device of backcharging the previously disputed work against funds otherwise owed to each subcontractor, and by citing each subcontractor as a claimant, although neither claims the price of the disputed work?

2. When the issue presented in an arbitration between a prime contractor and a mechanical subcontractor is whether it is the contractual duty of the mechanical subcontractor to perform certain disputed work, is an award finding that it is not the contractual duty of the mechanical subcontractor to perform the disputed work void on the ground that it is unresponsive?

3. Under the facts stated in Question 1, is the prime contractor estopped to challenge the award in favor of the mechanical subcontractor?

## STATEMENT OF THE CASE

The dispute involved in this case first arose between Petitioner and Respondent Mitchell. Respondent Mitchell has no contractual relation with the other Respondent, Alexander-Ernst. By letters dated October 19, and 26, 1955, Petitioner advised Respondent Mitchell that Petitioner had concluded it was the duty of Respondent Mitchell to perform certain work and directed Respondent Mitchell to perform. Under its subcontract, Respondent Mitchell was required to honor this direction (Joint App. 63 and 70). However, Respondent Mitchell demanded arbitration with Petitioner alone by letter dated May 25, 1956 (Joint App. 74). In this letter, Respondent Mitchell stated:

> "The matters in controversy between us are as follows:
>
> > 'Is it the contractual obligation of this company, under Subcontract Number 1132-1 dated July 2, 1954, as amended: (to perform the disputed work.)'."

Petitioner thereupon sought to have Respondent Alexander-Ernst joined as a party to the arbitration (Joint App. 76). This was opposed by Respondent Alexander-Ernst on the ground that it had no dispute with Petitioner or with Respondent Mitchell (Joint App. 79, 81).

The award specifically held that "there is no evidence before the arbitrators in this proceeding of any dispute between Tompkins-Jones and Alexander-Ernst which gives the arbitrators jurisdiction over Alexander-Ernst. * * *" so that Respondent Alexander-Ernst was dismissed. The award further specifically answered the second issue pre-

sented by finding "That it is not the contractual obligation of Lloyd E. Mitchell, Inc. under the above described subcontract to furnish or install any of the (disputed work)" (Joint App. 47).

By letter dated December 5, 1956 Petitioner agreed to comply with this decision of the American Arbitration Association (Joint App. 26). At the same time, Petitioner requested Respondent Mitchell promptly to complete all items of Respondent Mitchell's subcontract and promptly to complete the items of work upon which the arbitration had been held (Joint App. 26). Based upon this agreement and the Award of Arbitrators, Respondent Mitchell continued to perform the previously disputed items of work and, as each item of the work was completed by Respondent Mitchell, it sent an invoice therefor to Petitioner stating that the invoice was submitted in accordance with the decision rendered by the American Arbitration Association (Joint App. 27-45). Except for insignificant amounts representing work in progress at the time this suit was instituted, each of these invoices was paid to Respondent Mitchell by Petitioner without comment or argument.

On January 14, 1957 Petitioner advised Respondent Alexander-Ernst that it was the latter's obligation to perform the disputed work (Joint App. 85), and Petitioner withheld from payments otherwise due to Respondent Alexander-Ernst the amount of Respondent Mitchell's invoices for the disputed work.

Responsibility was denied and arbitration demanded by Respondent Alexander-Ernst (Joint App. 87). The Board held "That it is not the obligation of Alexander-Ernst, under its subcontract with Tompkins-Jones, to furnish or install any of the (disputed work)" (Joint App. 94).

Faced with the prospect that it had neglected to put the disputed work in either subcontract, Petitioner contrived the scheme of backcharging the full value of the disputed work against funds otherwise due to Respondent Mitchell and also of backcharging the full value of the work against funds otherwise due to Respondent Alexander-Ernst. Having thus artificially created these two funds, Petitioner filed a Complaint in Interpleader in the United States District Court for the District of Columbia (Joint App. 1). This Complaint made no mention of the two previous arbitrations and awards, but alleged that there was a dispute between Respondents "as to which subcontract required the performance of certain work." Petitioner sought to have the District Court determine to whom the "fund" should be paid and thus indirectly sought a review on the merits of the two previous arbitration awards.

When subsequent pleading by the Respondents brought forth the full facts, respective Motions of Respondents for Summary Judgment were granted. This decision was unanimously affirmed by the United States Court of Appeals for the District of Columbia Circuit.

## ARGUMENT

### I. There is No Conflict of Decision With Another Court of Appeals.

The consideration governing review on certiorari which Petitioner principally alleges is applicable to the instant Petition is that the decision of the U. S. Court of Appeals for the District of Columbia is in conflict with the decisions of other Courts of Appeals on the same matter. To support this contention, Petitioner cites a number of decisions of U. S. Courts of Appeals, including *U. S. v. Munn*, 105 F. 2d 578 (5th Cir., 1939), which was a claim for total permanent disability benefits under an insurance policy.

(Apparently Petitioner intended to cite *Standard Surety & Casualty Co. v. Baker*, 105 F. 2d 578 (8th Cir., 1939)).

While interpleader was allowed in the cases cited, they are so clearly distinguishable on the facts as to make manifest that there is no conflict. In each of the cases cited the most basic essentials of interpleader were present. There was a fund in dispute, to which there were claimants, actual or potential, whose claims were adverse. In the case at bar there was no fund until Petitioner artificially created one by backcharging the value of the disputed work against funds otherwise owed to each Respondent under their respective subcontracts. If this "fund" represents the value of the work, neither Respondent claims it. Since Respondent Mitchell has done the work under a new and special contract with Petitioner and has been paid for it, it has no claim. Respondent Alexander-Ernst has not done the work so that it cannot and does not claim the value of it. If the fund is considered as what it actually is, namely two equal sums withheld under each subcontract, then each Respondent claims only its share and the claims are not adverse. By this device of backcharging each Respondent, Petitioner seeks to create a dispute where none exists, in order to re-litigate the merits of the arbitration cases, a question which is collateral to the question of who is enfitled to a fund.

Far from being in conflict with the decisions of other circuits, the decision sought to be reviewed conforms with the only analogous case which counsel for Respondent Mitchell have discovered. That case is *Bierman v. Marcus*, 246 F. 2d 200 (3rd Cir., 1957), cert. den., *sub nom., Milmar Estate, Inc. v. Marcus*, 356 U.S. 933, 2 L. Ed. 2d 762, 78 S. Ct. 744 (April 14, 1958). There two stockholders brought a Bill of Interpleader to determine to whom the balance of the purchase price of their stock should be paid. They

joined as defendants the vendor of the stock and the issuing corporation, alleging that the issuing corporation might claim the balance. Subsequent pleading disclosed that the plaintiff stockholders were the sole stockholders of the corporation and that the true purpose of the bill was to obtain an adjudication of certain disputes with the vendor, including his asserted right to rescind for fraud. The Third Circuit held that the Bill should have been dismissed.

At 246 F. 2d 203-204, the Third Circuit stated:

> "Actually, what has been done in this suit has been to misuse interpleader, based on mere pretense of adverse claims to a fund, to obtain adjudication of controversies other than entitlement to that fund. While 'the normal duty of a district court (is) to permit interpleader liberally to relieve parties of the hazards and vexations of conflicting claims against them' (cit. om.), the asserted hazards and vexations here were as unreal as the asserted depredations of the casual ejector in the classic common law action to try land titles.
>
> "The interpleader action should have been dismissed once its true character was disclosed, as presenting no bona fide issue of the type essential to this form of equitable relief, and therefore, constituting an imposition upon the jurisdiction of the court.
>
> "Accordingly, the judgment will be vacated and the cause remanded with instruction to dismiss the complaint as not being predicated upon any bona fide fear of vexatious conflicting claims."

This is substantially the same reasoning used by the U. S. Court of Appeals for the District of Columbia Circuit in affirming the judgment of the District Court in favor of Respondents. The Court below in its opinion stated (Petitioner's Appendix, 4A):

> "They (Petitioner) assert, as they did in the District Court, that the disputed work fell within the scope of

one of the two subcontracts, and that in paying Mitchell for its performance, they had in effect made a payment on the price of one or the other of the two subcontracts.

"The argument ignores the fact that Tompkins-Jones were bound by the two arbitration awards, which held that neither subcontractor was obligated to do the disputed work. Although they had paid Mitchell for performing it, they apparently reasoned that, since the items were embraced in the general contract, they were included in one or the other of the two subcontracts, despite the decisions of the arbitrators. Because of this erroneous assumption, they created what was in fact an *artificial fund* in hand with *fictional adverse claimants* thereto, by withholding an amount equal to the cost of the extra items from moneys due under each of the subcontracts. In these circumstances, interpleader did not lie." (Emphasis supplied.)

## II. There is No Conflict With a Decision of This Court on a Federal Question.

U. S. Sup. Ct. Rule 19(1)(b) sets forth as a consideration governing review on certiorari the conflict between a Court of Appeals decision and one of this Court on a federal question. In the matter at hand, there is no federal question involved. The Petitioner does not cite or set forth any constitutional provision, federal statute, treaty, rule or regulation which it contends is involved. The real question involved is whether Petitioner may set aside the two arbitration awards. These arbitrations were held under provisions of the respective subcontracts and not under any national or District of Columbia statute. The arbitrations were, therefore, common law arbitrations. The question of the finality of the two awards is a question of the common law of the District of Columbia. In *Del Vecchio v. Bowers*, 296 U.S. 280, 80 L. Ed. 229, 56 S. Ct. 190 (1935), this Court stated that it will not ordinarily review on certiorari the

decisions of the United States Court of Appeals for the District of Columbia Circuit which do not constitute a precedent of general application but simply declare the common law of the District.

Petitioner argues, however, that the decision of the Court below is in conflict with the decision of this Court in *Texas v. Florida*, 306 U.S. 398, 83 L. Ed. 817, 59 S. Ct. 563 (1939). That case presented two questions, one procedural and jurisdictional, the other relating to the merits. On the first issue it was held that the claims of the states involved presented a case or controversy, in the nature of interpleader, within the original jurisdiction of this Court. Thus the federal question therein presented related to the jurisdiction of this Court in suits between states, a question not relevant to the present Petition. There is no conflict between the granting of interpleader in *Texas v. Florida* and the decision below denying interpleader since *Texas v. Florida* involved a bona fide dispute between actually adverse claimants. The second holding of *Texas v. Florida* was the determination of the state of domicile of a decedent. That question is in no way involved in the present Petition.

**III. There is No Important Question of Law**

The decision below presents no important question of law. The holding of the case applies only to the parties involved and does not set forth any precedent of general application. In essence Petitioner contends that one of the two subcontractors must have had the obligation to perform the disputed work. Petitioner sought to limit both arbitration proceedings to a question making this assumption which the Court below labeled as "erroneous". When this stratagem failed Petitioner asserted the awards were unresponsive.

Respondent Mitchell's Statement of the Case makes manifest that the awards were responsive. However, a review of the question of responsiveness *vel non* involves no question of general application. Such a review would involve consideration of the exchanges of letters requesting the arbitrations. These letters were drafted by the respective parties, using their own language with reference to their own specific, immediate contentions. Such matters are of necessity limited only to the instant specific fact situation. Thus a determination by this Court would not be a precedent applicable to the future dealings of others.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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